manner and demeanour the documentary evidence and the commercial nature of this transaction showed that Yauw Cheng Kwee's account that Ng Kah Chong telephoned him on April 20, 1977 and concluded on behalf of the appellants the contract with and as alleged by the respondents was not credible. We were satisfied on a full review of the entire evidence, oral and documentary, that the trial judge was plainly wrong in giving judgment for the respondents.

Appeal allowed.

Solicitors : *H. S. Narulla; Goh Aik Chew & Co.*

EXCELSIOR PTE. LTD. v. EXCELSIOR SPORT (S) PTE. LTD.

[O.C.J. (Chua J.), March 19, 1985]

[Singapore – Suit No. 991 of 1982]

Trade Name – Passing-off – Use of particular word in trade name – Fancy word – "Excelsior" used by plaintiffs for 34 years – Defendants' use of the word – Same or similar business activities – Confusion – Injunction – Damages.

This case concerns passing-off involving the use of a particular word in a trade name. The plaintiff company was incorporated in Singapore on January 17, 1947 and continuously carried on business there as a supplier of a variety of swimwear, sportswear and other clothing, trading at No. 66, High Street. The defendant company was incorporated in Singapore some 34 years later on April 18, 1981 and carried on essentially the same business as a supplier of sportswear and other clothing, trading at Peninsula Plaza not far away and using a name which clearly resembled that of the plaintiffs. The plaintiffs claimed that in the course of their business they had made exclusive use of the name "Excelsior Pte Ltd" and had acquired goodwill and reputation in the name or word "Excelsior". They said that the defendants' use of the name "Excelsior represented and/or held out to the public in Singapore that its business is associated or connected with the plaintiffs and/or that the defendants were the authorized agents of the plaintiffs. They said that such representation or holding out did or was calculated to annex to the defendants' business some part of the goodwill and reputation which had become annexed to the plaintiffs' business in Singapore or to pass off the defendants' business as and for the plaintiffs' business, and this led to the defendants' business being confused with the plaintiffs' business. The plaintiffs claimed that they have thereby suffered and continue to suffer loss and damage. They claimed an injunction to restrain the defendants from using the word "Excelsior" in their business.

The defendants said that they were associated in Hong Kong with a company with a similar name and their choice of their name was not intended to deceive or confuse.

Held: (1) the law relating to passing-off in relation to goods and to passing-off of trade name is the same;

(2) the evidence shows that the plaintiffs and defendants carry on the same or similar business activities. The prominent word of the two names is "Excelsior". It is not a common word, neither is it descriptive of the two businesses. It is a fancy word which the plaintiffs have used for 34 years. The close resemblance of the two names has caused and is likely to continue to cause confusion;

(3) there has been a clear breach of the plaintiffs' right to their trade name and that right has been infringed in circumstances which require that the Court should intervene to prevent future infringement;

(4) the plaintiffs were entitled to judgment with costs and $100 damages and an injunction in terms of prayer 1 of their Claim and the injunction should be suspended for a period of sixty days to enable the defendants to effect a change of their name to a name acceptable to the Registrar of Companies which does not include the name "Excelsior".

Cases referred to:

(1) *Reddaway* v. *Banham* [1896] A.C. 199.
(2) *The North Cheshire and Manchester Brewery Co., Ltd.* v. *Manchester Brewery Co. Ltd.* [1899] A.C. 83.
(3) *The Dunlop Pneumatic Tyre Co. Ltd.* v. *The Dunlop Motor Co.* [1907] A.C. 430.
(4) *Mun Loong Co. Sdn. Bhd.* v. *Chai Tuck Kin* [1982] 1 M.L.J. 356.
(5) *Ewing* v. *Buttercup Margarine Co. Ltd.* [1917] 2 Ch. 1.
(6) *Office Cleaning Services Ltd.* v. *Westminster Window and General Cleaners Ltd.* (1946) 63 R.P.C. 39.
(7) *Procea Products Ltd.* v. *Evans & Sons Ltd.* (1951) 68 R.P.C. 210.
(8) *Henderson* v. *Radio Corporation Pty. Ltd.* [1969] R.P.C. 218.

CIVIL SUIT.

Joseph Grimberg (*Loo Choon Hiaw* with him) for the plaintiffs.

Aloysius Leng for the defendants.

Cur. Adv. Vult.

Chua J.: The Plaintiffs, Excelsior Pte. Ltd., claim an injunction to restrain the Defendants, Excelsior Sport (S) Pte. Ltd., from using the word "Excelsior" in the name of the business known as Excelsior Sport (S) Pte. Ltd. carried on by them in Singapore.

The Plaintiff Company was incorporated in Singapore on January 17, 1947, and continuously

carried on business in Singapore as a supplier of a variety of swimwear, sportswear and other clothing and they trade at No. 66, High Street.

The Defendant Company was incorporated in Singapore on April 18, 1981 and carried on business as a supplier of sportswear and other clothing and they trade at Peninsula Plaza, at the corner of Coleman Street and North Bridge Road.

The Plaintiff Company has been for about 22 years the sole agents of "Munsingwear", a popular brand of American sportswear in Singapore and Malaysia.

Some 34 years after the incorporation of the Plaintiff Company, the Plaintiffs found that the Defendant Company had been set up in Singapore, doing business in essentially the same merchandise, not far away, and with a name that closely resembled the Plaintiffs' name.

The Plaintiffs say that in the course of their business and for the purpose of identifying and promoting the same, they have made extensive use of the name "Excelsior Pte. Ltd.". They further say that the Plaintiff Company has acquired goodwill and reputation in the name or word "Excelsior" and that members of the public have, during the course of 35 years since the Plaintiffs' incorporation, identified the name or word "Excelsior" with that of the undertaking and business of the Plaintiff Company and for 22 years with the supply by the Plaintiff Company of "Munsingwear" garments.

In the course of its business and for the purpose of identifying and promoting the same, the Defendant Company makes use of the name "Excelsior Sport (S) Pte. Ltd." The Plaintiffs say that the Defendant Company's use and continued use of the name "Excelsior" represents and/or holds out to the public in Singapore that its business is associated or connected with the Plaintiff Company and/or that the Defendant Company is the duly authorised agent of the Plaintiff Company. Such representation, or holding out, the Plaintiffs say, does, and/or is calculated to annex to the Defendant Company's business some part of the goodwill and reputation which has become annexed to the Plaintiffs' business in Singapore or to pass off the Defendant Company's business as and for the business of the Plaintiff Company, and has led to the Defendant Company's business being confused with the Plaintiff Company's business and to members of the public acquiring the goods and/or services of the Defendant Company in the belief that they are the goods and/or services of the Plaintiff Company.

The Plaintiffs say that by reason of the matters aforesaid they have suffered and continue to suffer loss and damage.

We are here not dealing with a case of passing-off in respect of goods, but are concerned with passing-off involving the use of a particular word in a trade name. The law relating to passing-off in relation to goods and to the passing-off of trade names is the same.

It is an actionable wrong for a defendant to represent, for trading purposes, that his goods are those or that his business is that of the plaintiff. In *Reddaway* v. *Banham*[1] Halsbury L.C. said (at p. 204):

> "For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else.
>
> How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact the legal consequence appears to follow."

The ground of interference by the Courts in trade name cases is that the use of the defendant company's name is calculated to deceive or has deceived and so to divert business from the plaintiff to the defendant or occasioned a confusion between the two business (*Kerly's* Law of Trade Marks and Trade Names, 10th Ed. paragraph 16-73). Whether or not there is confusion is a question of fact (*The North Cheshire and Manchester Brewery Co., Ltd.* v. *The Manchester Brewery Co., Ltd.*;[2] *The Dunlop Pneumatic Tyre Co., Ltd.* v. *The Dunlop Motor Co.*,[3] judgment of Lord Loreburn L.C. at page 436).

In order to succeed it is not necessary for the Plaintiffs to prove fraudulent intention on the part of the Defendants (*Kerly*, paragraph 16-74). Nor do the Plaintiffs need to show actual deception (*Kerly*, paragraph 16-77).

I now turn to the facts in this case. The evidence before me establishes that the Plaintiffs' name has acquired a goodwill and reputation in Singapore and Malaysia and in particular that they have acquired goodwill and reputation by the extensive

use of their name while carrying on the business of suppliers of a wide variety of swimwear, sportswear and other clothing and in particular as the sole agents of "Munsingwear" sportswear. Members of the public have in the course of thirty-five years identified the name "Excelsior" as the Plaintiff Company and as the sole agents of "Munsingwear" sportswear for twenty-two years.

The Defendants say that they are associated in Hong Kong with a company with a similar name and their choice of their name was not intended to deceive or confuse. The Plaintiffs and the Defendants carry on the same type of business and it is not incumbent on the Plaintiffs, in order for them to succeed, to establish that the Defendants set out to deceive (see *Mun Loong Co. Sdn. Bhd.* v. *Chai Tuck Kin*[4]).

The trade name will normally have attached to it a goodwill that the courts will protect. An action for passing-off, as I have said, will lie wherever the defendant company's name is calculated to deceive, and so to divert business from the plaintiff to the defendant, or to occasion a confusion between the two businesses (*Kerly* paragraph 16-50). If a trade name suggests that the defendant's business is an extension, branch or another agency of or otherwise connected with the plaintiffs's business an injunction will be granted (*Ewing* v. *Buttercup Margarine Co. Ltd.*[5]).

The Plaintiffs' evidence establishes the fact that confusion existed and continues to exist between the business of the Plaintiffs and that of the Defendants. It is clear from the evidence that the Plaintiffs and the Defendants carry on the same or similar business activities. The Plaintiffs deal mainly in clothing and sportswear, the Defendants in sportswear. The prominent word of the two names is "Excelsior". It is not a common word neither is it descriptive of the two business. It is a fancy word.

Lord Simonds in *Office Cleaning Services Ltd.* v. *Westminster Window and General Cleaners Ltd.*[6] had this to say as regards a fancy word (at p. 42):

> "So it is that, just as in the case of a trade mark the use of descriptive words is jealously safeguarded, so in the case of trade names the Courts will not readily assume that the use by a trader as part of his trade name of descriptive words already used by another trader as part of his trade name is likely to cause confusion and will easily accept small differences as adequate to avoid it. It is otherwise where a fancy word has been chosen as part of the name. Then it is that fancy word which is discriminatory and upon which the attention is fixed, and if another trader takes that word as part of his trade name with only a slight variation or addition, he may well be said to invite confusion. For why else did he adopt it?"

Here the Defendants have chosen a fanciful word which the Plaintiffs have used for thirty-four years. The evidence of the Plaintiffs is that in the course of business the customers refer to them as "Excelsior". This is a fancy word "which is discriminatory and upon which the attention is fixed". The word "Sport" in the Defendants' name is insufficient to distinguish the Defendants' business from that of the Plaintiffs' since it precisely describes the nature of the Plaintiffs' business. I find that the close resemblance of the two names has caused and is likely to continue to cause confusion.

The two businesses in this case are only one block apart and, that being so, it seems to me inevitable that confusion must be created by the Defendants carrying on a not very dissimilar business not very far away in the same shopping area.

There is ample evidence of actual confusion arising from the Defendants' use of their name. There were misdirected telephone enquiries. The Plaintiffs received one or two calls daily for the Defendants in 1981. The callers would invariably ask for "Excelsior" and then it would be ascertained that the call was meant for the Defendants. There was an occasion when the Plaintiffs and the Defendants placed an advertisement in the programme of the Inter-Airlines Golf Tournament and the Plaintiffs' name was left out of the Advertisers' Index. The organisers of the Tournament subsequently apologised for the oversight. They had mistaken the Defendants to be the Plaintiffs. There were instances of letters addressed to the Plaintiffs being wrongly delivered addressed to the Defendants and even as recently as 1985 the Plaintiffs continued to receive mail meant for the Defendants.

In *Procea Products Ltd.* v. *Evans & Sons Ltd.*[7] it was held that although no damage had been proved, an action for damages for passing-off lies without proof of actual damage and the Court awarded nominal damages. See also the case of *Henderson* v. *Radio Corporation Pty. Ltd.*[8].

In all the circumstances it appears to me that there has been a clear breach of the Plaintiffs' right to their trade name; that that right has been infringed in circumstances which require that the Court should intervene to prevent future infringe-

ment and the Plaintiffs, accordingly, are in my view entitled to an injunction.

There will be judgment for the Plaintiffs with costs and $100 damages and an injunction in terms of prayer 1 of their Claim and the injunction be suspended for a period of sixty days to enable the Defendants to effect a change of their name to a name acceptable to the Registrar of Companies which does not include the name "Excelsior".

Claim allowed.

Solicitors : *Drew & Napier; Netto Low & Partners.*

PUBLIC PROSECUTOR v. WONG HONG TOY & ANOR.

WONG HONG TOY & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Wee Chong Jin C.J.) April 18, 1985]

[Singapore – Magistrate's Appeal Nos. 8, 9, 11, 12, & 13 of 1984 and Magistrate's Appeal Nos. 14 & 15 of 1984]

Criminal Law and Procedure – Accounts of Society – False statement and declaration – Cheques not accounted for – Whether Court authorized by RSC to receive declaration as evidence – Penal Code (Cap. 103), ss. 193 & 199 – R.S.C. 1970, O. 30 rr. 4(1), (2), (3) & 4, O.41 r. 5(2) – Statutory Declarations Act, 1835, ss. 2, 3 & 4.

Criminal Law and Procedure – Cheques endorsed in favour of third parties – Whether property of Society – Receiver – Preventing distribution to creditors – Fraud – Penal Code, ss. 34 & 421.

Company Law – Societies – Unregistered companies – Insolvency – Whether Society can be wound-up – Appointment of receivers – Companies Act (Cap. 185), ss. 314 & 315 – Societies Act (Cap. 262) – Bankruptcy Act (Cap. 18).*

Penal Code, ss. 34, 193, 199 & 421 – False statement – Fraudulent removal of property.

These seven appeals were heard before the learned Chief Justice in the High Court. They arose out of a joint trial of five charges against Wong Hong Toy ("Wong") and J.B. Jeyaretnam, an advocate and solicitor, ("Jeyaretnam"), respectively the Chairman and Secretary-General of the Workers' Party. In two of these five charges (DAC 4151/83 & DAC 4152/83), they were charged separately under section 199 read with section 193 of the Penal Code. In the other three charges (DAC 4153/83, DAC 4154/83, & DAC 4154A/83) they were charged jointly under section 421 and section 34.

The five charges centred around three cheques for the respective sums of $2,000, $200 and $400. In each of these cheques, the name of the Workers' Party as the payee was written by the person who issued it. All these cheques were delivered by the drawers to either Wong or Jeyaretnam. None of these cheques was paid into the account which the Workers' Party maintained with its bankers. The $2,000 cheque was endorsed by Wong and Jeyaretnam in favour of and paid into the account of a third party. The $200 cheque was endorsed by Jeyaretnam and the Treasurer of the Workers' Party and paid by Wong into his personal bank account. The $400 cheque was not endorsed by the Workers' Party and was cashed by an unknown person. The fact of the receipt of the three cheques by the Workers' Party did not appear in any of the Workers' Party account books or in any statements of accounts prepared by its Treasurer for the period January 1, 1982 to June 16, 1982. Having failed in its defamation actions, the Workers' Party owed one Tay Boon Too taxed costs of $17,101 as at July 10, 1975. It also owed the Attorney-General taxed costs of $15,189 as at July 1975. On execution by Tay Boon Too, the Workers' Party had $18.47 in its bank account. Subsequently, the Official Receiver was on June 11, 1982 appointed receiver of the assets of the Workers' Party. Wong and Jeyaretnam made a joint declaration of accounts on August 3, 1982 before a Commissioner for Oaths in terms of the draft of the receiver. As a result, they were charged on the five charges.

Held, in respect of the section 199 Penal Code charges (DAC 4151/83 'DAC 4152/83); (1) the declaration, being a document permitted by O.41, r.5(2), RSC, to form part of the affidavit accompanying the receiver's own account presented to the High Court for passing and certification, was a declaration which the Court was authorized by the Rules of the Supreme Court to receive as evidence in the receivership proceedings;

(2) the trial judge erred in law in finding that the prosecution had failed to prove a *prima facie* case under section 199 and in acquitting Wong and Jeyaretnam without calling on each of them to enter upon his defence;

(3) there should be a fresh joint trial before another judge.

Held, in respect of the section 421 Penal Code charges: (1) the defence that the property in the $2,000 cheque never passed to the Workers' Party was rejected. The cheque was a gift from Dr. Ivy Chew to the Workers' Party. In all the circumstances, the inference clearly arises that by their acts, Wong and Jeyaretnam intended to place the proceeds of the cheque, when cashed, out of the reach of creditors of the Workers' Party and in particular, Tay Boon Too, a judgment creditor, in circumstances which constitute an intent to defraud within the meaning of section 421;

(2) at all material times, the $200 cheque given by Ping was the property of the Workers' Party. The inference is irresistible that by their acts, Wong and Jeyaretnam intended to place the proceeds of the $200 cheque out of the reach of the creditors of the Workers' Party and in particular, Tay Boon Too, in circumstances which constitute an intent to defraud within the meaning of section 421.

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* See ss. 350 & 351 of Reprint of The Companies Act (Cap. 185 of The Revised Edition) 1985.